

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.828 OF 2013

Madhukar Baswant Barora

Age : 25 years, Occ.: Business,
R/at : Rasgaon, Tal. Shahapur,
District Thane

.... Appellant

Vs.

The State of Maharashtra
(Through Shahapur Police Station)

.... Respondent

Ms. Shraddha Sawant, Court appointed Advocate for the Appellant.
Mr. S.R. Agarkar, APP for the State.

Coram : **Smt. Sadhana S. Jadhav, J.**
Date : **1st April 2019**

JUDGMENT :

1 Heard the respective counsel.

2 The appellant herein is convicted by the learned
Additional Sessions Judge, Kalyan vide judgment and order dated 3rd
July 2012 for the offences punishable under Sections 366 (A), 376,
306 and 506 of Indian Penal Code. The appellant is sentenced to

suffer rigorous imprisonment for a period of five years, ten years, five years and three years, to pay a fine of Rs.3,000/- each, in default to suffer rigorous imprisonment for three months, three months, three months and two months respectively. All the substantive sentences shall run concurrently.

3 It is the case of the prosecution that on 13th October 2009, Ms. "X" was admitted by her father and relatives in the Civil Hospital, Thane with history of burn injuries. The injured had sustained about 82% burn injuries. The statement of the injured was recorded by PSI, Manohar Parsu Patil (PW-6). The injured had disclosed to the Head Constable that on 11th October 2009 at about 10.00 pm., she had gone to answer nature's call outside her house. According to her, the present appellant had threatened her at the point of knife and had dragged her into the forest nearby Lenadi River. He had ravished her. He had then taken her to an unknown place, detained her under the threat and she was sexually assaulted throughout the day. On the next day, i.e. 13th October 2009 in the early hours at 4.00 am., he had dropped her near her house. She

opened the door of her house and poured kerosene from the plastic can on her person and set herself on fire in the open place in front of her house. When she could not bear the pains, she started shouting and upon hearing her cries, her parents woke up and extinguished the flames by pouring water on her person and thereafter she was taken to Government Hospital. On 19th October 2009, Ms. "X" had succumbed to the burn injuries. The victim was resident of Shahapur and therefore initially the offence was registered as 00/09 for the offence punishable under Sections 366(A), 376 and 506(II) of Indian Penal Code and transferred to Shahapur police station for further investigation. The appellant-accused was arrested on 20th October 2009. The memorandum of post-mortem indicates that she had sustained burn injuries on both upper and lower extremities to the extent of 82% and the remark was written as follows :

"Burnt area shows reddish dark demarcation around it foul smell, covered by greenish slough, singeing of hairs seen at places smell of kerosene perceived from scalp hairs.

The cause of death was "due to burns".

4 After completion of investigation, the charge-sheet was filed on 16th January 2010. Since it was a case of self immolation, the appellant was charge-sheeted for the offence punishable under Section 306 of Indian Penal Code as well.

5 The prosecution has examined as many as ten witnesses to bring home the guilt of the accused. It is pertinent to note that apart from the statement recorded by PW-6, the statement was also recorded by the Special Executive Magistrate on 13th October 2009 at about 8.10 pm. The Special Executive Magistrate has not been examined by the prosecution for the best reason known to them and hence the said statement has not been exhibited. The case mainly rests upon the dying declaration, which is at Exhibit 23 and the oral dying declaration as alleged to have been given to the father of the victim.

6 Learned counsel at the outset submits that the manner of recording of dying declaration is such, that it would not inspire the confidence of the Court. It is submitted that in fact the victim had

sustained about more than 82% burn injuries. According to the prosecution, she was a rape victim. The treatment had started soon after she was admitted as has been stated by Dr. Yerolkar.

7 PW-7, Dr. Yogesh Sheshrao Yerolkar, who is a Gynaecologist had examined her soon after she was admitted. PW-7, Dr.Yerolkar has deposed before the Court that on general examination, he found that she had 82% burns and on abdominal examination, abdomen was soft. That she was conscious, not oriented to time and place. In the cross-examination, the Doctor had specifically admitted as follows :

“It is true that there was no any sign of rape on the earlier day of her admission in the hospital and that old hymen tear which was one or two months old.

He has further admitted as follows:

“It is true that I was asked as to whether said patient was raped or not. I did not give any information in the said certificate that there was a rape on the said patient”.

Learned counsel further submits that PW-4, Dr. Mrs. Arati Chandrakishore had stated that the patient was conscious when she

was brought to the hospital and she was referred to Gynaecology department for Gynaecology opinion. It is therefore submitted that it is doubtful as to whether the injured was oriented at that time when the statement was purportedly recorded.

8 PW-6, PSI Manohar Parsu Patil has deposed before the Court that he was accompanied by ASI when he had been to record dying declaration of the injured. ASI, Shardul had obtained the consent of the Doctor for recording the statement of the patient. At the bottom of the said statement, he had obtained thumb impression of the said patient. The said statement is at Exhibit 23. He has stated that the contents are true and correct. He has deposed that Special Executive Officer namely Shankar Antu Kolekar was present alongwith him. PW-6 has admitted in the cross-examination that he had reached the hospital at about 4.50 hours and recording of the statement had commenced at about 7.15 pm. and completed the same at about 8.00 pm.

9 At this stage, it is pertinent to note that Shankar Antu Kolekar has recorded the statement at 8.10 pm.. This would show

that the statements were simultaneously recorded. The Special Executive Officer had knowledge about the narration recorded by PW-6. It is further admitted in the cross-examination that he had taken thumb impression twice as first impression was not proper as there were burn injuries.

10 Perused the original statement at Exhibit 23. The first thumb impression is not clear, but the second impression would show that the ridges and lines on the thumb are clearly demarcated. This Court cannot be oblivious of the fact that the victim had sustained burn injuries to her lower extremities also. The skin must have peeled off and ridges would not be clear as are seen from the said thumb impression.

11 The basic contention of the learned counsel for the appellant is that the contents of the dying declaration are not proved by the prosecution and therefore no conviction can be recorded on the basis of the said dying declaration. Learned APP has placed reliance upon the Full Bench judgment of this Court in the case of

Ramesh s/o Gyanoba Kamble Vs. State of Maharashtra, reported in 2011 (6) Maharashtra Law Journal, page 927, the Full Bench has held as follows:

“For proving a dying declaration recorded by a person/ Magistrate/ Executive Magistrate, it is not essential requirement of law that the recorder should repeat, while deposing before the Court, the contents of the declaration in the words spoken by the deceased as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death. In other words, the recorder of a dying declaration need not depose before the court, in the words spoken by the deceased, about the name/ description, and the act of the accused, which resulted in his death”.

As far as the dying declaration recorded by the Special Executive Officer is concerned, it can be safely inferred that the said dying declaration has not been proved by the prosecution. The Full Bench has held as follows :

“To prove the dying declaration, the prosecution needs to bring it on record through a competent witness or it should come on record from proper custody-- Once it is placed on record, the Court can admit and exhibit the same-- However, mere production and marking of the dying declaration as exhibit cannot be held to be a proof of its contents”.

12 In the present case, several factors will have to be taken into consideration to ascertain as to whether the dying declaration was voluntary, truthful and would inspire confidence of the Court. For this purpose, the deposition of PW-5 i.e. father of the victim needs to be taken into consideration. PW-5, Jairam Hari Sawant has deposed before the Court that in the early hours of 12th October 2009 at about 6.30 am., the parents realised that Ms. “X” was not in her bed. They searched for her throughout the day at different places and enquired with the relatives for the whole day, she could not be found. At night, they were sleeping in the house. In the early hours of 13th October 2009, they woke up upon hearing the cries of their daughter Ms. “X”. They saw Ms. “X” in flames and had extinguished fire by pouring water on her, then she was taken indoors. They found a plastic can of kerosene, burnt pieces of cloth and hair at the place of incident that means in the house. The witnesses in consonance with the narration of the dying declaration that the victim had entered into the house in early hours, taken the kerosene can, poured the kerosene on her person and then came out of the

house and set her on fire.

13 PW-5 has further deposed that while in transit to the hospital, the victim had disclosed to her father that the accused had threatened her at the point of knife and took her in the forest at the bank of Lenadi River. The accused committed rape on her and therefore she set herself on fire, as she was ravished by the accused against her wish. He has further stated that the accused-appellant is resident of his village. In the cross-examination, the father of the victim PW-5 has admitted that he had not lodged missing report till 13th October 2009. That there are other six residential houses around his house. The said houses are belonging to his community. It is admitted that they are his relatives. His house has thatched roof and the house of the accused is at the rear side of his house. It is also admitted that while standing in the courtyard of the house of the accused, the house of the victim is not visible as there is a separate way to the house of the accused. *It is further admitted that there is a latch facility to the door of his house and that is the only door to his house. It is also admitted that on 11th October 2009, when he*

woke up, he found the latch of the door from inside intact. He has further admitted that the accused was married. He is the Carpenter by profession and he used to go to other villages for his work for 3-4 days. His daughter had not complained against the accused at any point of time in the past. He has categorically admitted that his daughter was completely burnt. According to him, Lenadi River is at half an hour's walk from his village. There is jungle upto the said River.

14 Learned counsel for the appellant submits that the very fact that the latch of the door was intact from inside, it is clear that the victim had not left the house after her parents had gone to sleep, or else they would have found door opened in the morning. The question remains how she had ingress to the house when it was latched from inside.

15 At this stage, the learned counsel for the appellant has also drawn attention of this Court to the statement of the accused recorded under Section 313 of Code of Criminal Procedure.

Question No. 11 reads as follows :

“Q. 11. It is disclosed in the evidence of Manohar Parsu Patil (PW-6) then API that he met the medical

officer and recorded dying declaration of deceased Madhuri Exh.23 and obtained certificate of the medical officer. He sent the said statement and other documents to Shahapur Police Station with the report Exh. 25, What do you want to say about the same ?

Ans. I do not know.

It is seen that, that is the only reference to Exhibit 23. The contents of the dying declaration which are held to be incriminating stand against the accused have not been put to the accused and therefore it is clear that the accused had no knowledge as to what was the dying declaration/statement of the deceased against him, due to which the offence was registered against him. This would show that the conviction is based on the oral dying declaration to the father of the deceased. In the case of Shaikh Maqsood Vs. State of Maharashtra, reported in (2009) 6 Supreme Court Cases, page 583, the Hon'ble Supreme Court has held:

“8. “12 The purpose of Section 313 of the Code is set out in its opening words-- 'for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him'. In *Hate Singh Bhagat Singh V. State of Madhya Bharat*, it has been laid down by Justice Bose (A.I.R. page 469, para 8) that the statements of the accused persons recorded under Section 313

of the Code 'are among the most important matters to be considered at the trial". It was pointed out that (AIR P. 470) :

'8...the statements of the accused recorded by the committing Magistrate and the Sessions Judge are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness box (and that they) have to be received in evidence and treated as evidence and be duly considered at the trial.....".

This position remains unaltered even after the insertion of Section 315 in the Code and any statement under Section 313 has to be considered in the same way as if Section 315 is not there.

13. The object of examination under this Section is to give the accused an opportunity to explain the case made against him. This statement can be taken into consideration in judging his innocence or guilt. Where there is an onus on the accused to discharge, it depends on the fact and circumstances of the case, if such statement discharges the onus."

14. The word 'generally' in sub-section (1)(b) does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the question should relate to the whole case generally and should also be limited to any particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. The whole object of the section is to afford the accused a fair

and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. A conviction based on the accused's failure to explain what he was never asked to explain is bad in law. The whole object of enacting [Section 313](#) of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give.

15. The importance of observing faithfully and fairly the provisions of [Section 313](#) of the Code cannot be too strongly stressed.

'30. It is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material substance which is intended to be used against him. The questioning must, therefore, be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. **..Fairness, therefore, requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand.**

16 In the present case, the appellant is a Carpenter. He is illiterate. He was just 23 years old at the time of incident. In fact

the case rests upon the allegations levelled against the appellant in the dying declaration. However, the same are not put to him and therefore it can be safely inferred that the material circumstance on the basis of which the conviction is recorded in the present case has not been put to the accused, thereby causing serious prejudice to the defence of the accused. The Full Bench in the case of *Ramesh Gyanoba Kamble* (Supra) has held:

21.3. we observe that insofar as the statement of an accused under [Section 313](#) of the Cr.P.C. is concerned, if the evidence brought on record is sufficient to bring home guilt of the accused, the omission to put any particular circumstances to the accused under [Section_313](#), does not, ipso facto, vitiate the proceedings **unless any prejudice caused to the accused is established by him.**

17 It is true that the same was challenged before the trial Court but there was no occasion for the appellant to challenge the same in the trial Court as the statement under Section 313 of Cr.PC. is recorded at the fag-end of the trial. There was no opportunity to challenge the same and hence, the accused deserves to be acquitted since it is not possible to correct the said irregularity by any other means at this stage and therefore it has become incumbent upon the

Court to consider the impact of the lapse on the overall aspect of the case.

18 Moreover, besides the dying declaration, there is no other material to support the case of the prosecution as the substantive evidence of PW-5 is full of inherent omissions and contradictions. This Court is of the opinion that the said irregularities if any, in recording the statement under Section 313 of Cr.P.C. is concerned, cannot be rectified at this stage for the simple reason that the accused has undergone the whole of the sentence and was in custody from 2009 to 2019 and has served the substantive sentence of 10 years and therefore it would be futile to make an endeavour to fill-up lacunae in recording of the statement under Section 313 Cr.P.C.. Hence, the accused deserves to be acquitted of the charges levelled against him.

19 It would be difficult to part with the judgment without appreciating the efforts taken by learned counsel Ms. Shraddha Sawant, who was appointed to espouse the cause of the accused. The accused has taken a specific defence that not only the case is

false in which he has been implicated but also he was not in the village during the period from 11th October 2009 to 13th October 2009. This has to be read in consonance with the admissions of PW-5 that being a Carpenter, the accused/appellant used to remain outside the village for 3-4 days in a week. Hence, the following order :

ORDER

- (I) The appeal is allowed.
- (II) The conviction awarded to the appellant by the learned Additional Sessions Judge, Kalyan vide judgment and order dated 3rd July 2012 for the offences punishable under Sections 366 (A), 376, 306 and 506 of Indian Penal Code is quashed and set aside.
- (III) Fine amount if paid, be returned to the accused-appellant as per rule.
- (IV) The professional fees of Learned Counsel, Ms. Shraddha Sawant, is quantified as per rules. The fees to be paid by High Court Legal Aid Services Committee within three months from today.

(*Smt. Sadhana S. Jadhav, J*)